

## CURRENT DEVELOPMENTS

## The Michigan Guidelines on Refugee Freedom of Movement, or: how explosive existing law can be

DANA SCHMALZ — 31 May, 2017



The Michigan Guidelines are a document in which legal scholars summarize the existing international laws of refugee protection on one particular aspect. They are “just” an expert opinion – yet by no means insignificant in that capacity. They are used by courts interpreting the law and thus stand themselves at the threshold of the legal. At any rate the guidelines can frame debates about the legality of state actions in the area of refugee protection and migration control. They summarize the relevant provisions and offer an interpretation, which, although of course not undisputable, is grounded in a broad consensus and anything but eccentric.

The Guidelines appear every two years on different topics, the ones of this year dealing with *Refugee Freedom of Movement* – possibly the most pressing among the many pressing issues of the field at the moment. Free movement of refugees constitutes a subject area, in which current state practices in several cases clash with existing international law: regarding the detention of refugees, the restrictions on their mobility in the host state, or regarding measures of deterrence and border security.

### Not a one-sided scolding

This said, the Guidelines are one thing certainly not: one-sided scolding of state politics with reference to legal provisions. They constitute an instrument, which in the best sense strives for balance, which treats the law as a medium of rationalizing competing interests and viewpoints, and correspondingly seeks to uncover its underlying normative considerations. In that vein, the Guidelines set out in the introduction by stating that refugees’ freedom of movement is essential for all meaningful protection, and that it both underlies the 1951 Refugee Convention and is supported by the International Covenant on Civil and Political Rights. At the same time, they stress that this principle of freedom of movement meets other legally recognized interests: to conduct effective border controls, to respect concerns of receiving communities, to tackle human trafficking.

### The right to leave every country

The *Michigan Guidelines* thus aim to clarify how the existing law reconciles competing

interests, or to offer an interpretation that strives for such reconciling position. The first aspect, in which refugee freedom of movement is discussed, is the right to depart. Article 12 of the International Covenant on Civil and Political Rights (ICCPR) lays down the right to leave every country, including one's country of origin. It is in that regard that opposing state interests to restrict free movement have the least weight: Under special circumstances, national security, public health, or the protection of the rights of others can justify restrictions – but only as far as those are provided by law and proportionate to the aim pursued.

The Guidelines specify some cases, in which a restriction can accordingly not be regarded as legal: Concerns about the departing individual's life or safety cannot serve as a justification for refusing his or her departure (para. 6). Moreover can the objective to deter human smuggling not legitimate restrictions on the right to departure: Potential breaches of another state's migration laws do not fall under the *ordre public* exception of Article 12 ICCPR (para. 7). And even where the prevention of human trafficking is at stake, state measure must primarily be directed against the activities of traffickers and not against the individuals seeking to leave the country (para. 8).

Those specifications are important with regard to states, which restrict departure directly or indirectly. Eritrea for instance invariably requires citizens to obtain an exit visa, which is granted under inconsistent and non-transparent conditions only (cf. a report by the UK Home office). But the observations are also significant regarding the current migration policies of the European Union: Member states put, as for example in the Malta declaration from February this year, an “effective control of [the] external border” and the stemming of “illegal flows into the EU” first, thereby centrally relying on the cooperation with Libya as an important transit country. That Libya is committing massive human rights violations from the detention of migrants up to torture has been described by a report of the United Nations last December. On the basis of the *Michigan Guidelines*, it can moreover be stressed: The aim of migration control by the European Union does not legitimate to systematically create in the cooperation with Libya incentives for hindering the departure of migrants from there.

### **Access to protection**

Equally explosive for the current orientation of EU migration politics – and the one of many other states – are the specifications regarding access to protection. In that vein, the above-mentioned conflict between a state interest in controlling access and the freedom of movement of asylum seekers shows up the most pertinently: With the arrival on a state's territory, or from the moment of being under its jurisdiction, migrants hold the full range of rights from international human rights conventions. This has led to states increasingly trying to prevent this first contact, thus to a “schizophrenic attitude” (cf. Hathaway/Gammelthoft-Hansen 2015) of upholding high standards of protection while eagerly hindering the access to these very rights.

The *Michigan Guidelines* in that context firstly state that the duty of *non-refoulement* applies on a state's territory as well as at its borders (para. 9). To the potentially most influential of the Guidelines then belongs the assessment that a state may not construct or maintain a man-made barrier without providing at the same time for reasonable access to the territory. In simple words: No wall without gate. That might appear obvious to not render void the normative idea of the refugee – as the exceptional case in which the state has not full discretion to unilaterally decide about access. A refugee protection that has “entirely succeeded” to shut itself off from all those in need of protection would not be worthy of that name anymore. Yet the seeming obviousness of that statement

contrasts with reality in many places – for instance in [Melilla](#).

The *Guidelines* promise to be influential in that question exactly because they argue with a decidedness that does not generally mark the debate. For instance does [Moria Paz describe](#) how the conflict between universal human rights and states' commitment to control migration crystallizes into the emergence of border walls, and argues that the adequate legal response is anything but clear. The *Michigan Guidelines* by contrast draw – quite convincingly – on a “good faith understanding of the duty of *non-refoulement*”, which, they argue, requires states to provide in a reasonable manner for possibilities to actually claim the protection foreseen in international law.

### Liberty and free movement after arrival

Following the various aspects of freedom of movement on an international level, the *Guidelines* also deal with the question of liberty and free movement of refugees once they have arrived in a host state. That concerns the conditions for detention, as well as for other restrictions on free movement such as in Germany for instance the residential obligation. Here again, the *Guidelines* depict the normative compromise between freedom of movement and an interest of control: A limitation of free movement in the very earliest moments after arrival is permissible, as far as prescribed by law and proportionate in light of the aim pursued, for instance serving to determine a person's identity (para. 15). Any detention at a later point has to be justified on an individuated basis and underlies strict requirements for justification (para. 16).

Not only detention but also any other limitation of free movement, be it a direct or indirect result of state action, is permissible only under conditions (para. 19, 20). This standard applies not just once a claim for protection has been recognized, but equally to asylum seekers waiting for their application to be assessed (para. 18). The territorial restriction of the residence permit foreseen in German Asylum Law (§56 AsylG) does in its blanket nature hardly meet these requirements: A limitation to freedom of movement applicable only to asylum seekers contravenes the normative standard of Article 12 in connection with Article 26 ICCPR (para. 19). Also in that regard, the *Michigan Guidelines on Refugee Freedom of Movement* demonstrate that international refugee law remains significant – and demanding.

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